IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1371

NICHOLAS BUIAN

Petitioner

-vs-

CLIFFORD BAUGHARD, et al.,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Sixth Circuit

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STATEMENT OF THE CASE

Respondents agree with the Petitioner's Statement of the Case except for the following additions and/or corrections. At the time Petitioner submitted his resignation it was personally given to Respondent Jack Moye, President of the Civil Service Commission of Akron. The pertinent portion of that letter of resignation stated: "Due to the fact that I have decided to accept a position in the State of Arizona, where my children and grandchild reside, I would like to submit my resignation as City of Akron, Personnel Director, effective on the pay period ending March 19, 1977." (Petitioner's Trial Exhibit 1).

Petitioner's letters attempting to revoke his resignation were circulated on March 20, 1977. The only letter served was that addressed to Respondent, Robert Wheeler.

When the Commission met on Monday, March 21, 1977, it was announced that the Personnel Director had resigned ... "effective the pay period ending on March 19, 1977" and that the purpose of the meeting was to appoint an interim director and a search committee for a new director.

Argument

A review of the decisions of this court in Paul v Davis, 424 U.S. 693 (1976) and in Carey v Piphus, 435 U.S. 247 (1978) reveals there is no conflict between them and the instant case and therefore Petitioner's Petition for a Writ of Certiorari should not be granted.

Appellant has asserted that the Trial Court had jurisdiction over Appellees, Clifford Baughard, George Bland, John Bailey, Helmut Klemm, and John Doe, by virtue of Title 28 of the United States

Code, Sections 1331 and 1343, and Title 42 of the United States Code, Section 1983, in that his right of privacy guaranteed under the Constitution of the United States has been violated.

It is remotely possible for an invasion of privacy suit to be based on Sections 1331, 1343, and 1983. This, however, did not happen to be that situation wherein the slim mathematical potentiality converted into reality.

By far, the most usual outcome is found in Baker v. Howard, 419 F. 2d 376, 377 (9th Cir. 1969), wherein an attempt was made to base jurisdiction on Sections 1331, 1343, and 1983. The situation was that:

> "... after the police had investigated a suspicious incident involving him and had concluded that no crime had been committed, the police deliberately released to KAGO (radio station) a police report containing 'libelous and false statements'

> suggesting that plaintiff had committed a crime. KAGO then published the report to the community. According to Baker, this conduct directly resulted in the loss of his teaching job and also damaged him in other ways."

Despite plaintiff's assertion of an invasion of privacy, the case was dismissed for failure to state a claim.

In fact, the Court in Mimms v. Philadelphia Newspapers, Inc., 372 F. Supp. 862, 865 (E.D. Pa. 1972) observed that:

> "We have found only one case, York v. Story, 324 F. 2d 450 (9th Circ. 1963) cert. denied, 376 U.S. 939 (1964), in which an invasion of privacy was held to give rise to a cause of action under the civil rights law."

York, which was alluded to above, involved an extremely bizarre fact situation. A young woman who was the victim of an assault came to the police station to report the attack. A policewoman was available at the police station throughout

the relevant time span, but she was never consulted in any way to help the young woman victim. Instead a male police officer, Story, took the victim into a back room of the station and ordered her to undress. The victim repeatedly objected and told Story that there were no bruises to observe. After the victim had been finally coerced into undressing, she was forced to assume various indecent and obscene poses. Story photographed the girl in these poses using official police photographic equipment. The Court in York states flatly that there was no legitimate purpose for the disrobing or photographing. When the victim inquired about the photographs sometime later, Story lied and told her that they had been destroyed. In truth, Story and other officers had duplicated the coerced photographs and

and then had widely circulated them. Faced with this rather extreme factual background, a divided court held that an invasion of privacy could lie under the civil rights statutes.

The Ninth Circuit has, as have other courts, refused to enlarge the boundaries of invasion of privacy in this area, beyond the outer limits delineated in York. See, for example, Baker v. Howard, 419 F. 2d 376 (9th Cir. 1969). As the Court in Travers v. Paton, 261 F. Supp. 110, 115 Note 15 (1966), observes:

> "The York case involved both a restraint of plaintiff's liberty and grossly obscene conduct. The case cannot be cited as creating a general right of privacy protected by the Civil Rights Act in the absence of these extreme circumstances."

Turning now to the instant matter, we see that it arises out of a currently unresolved murder case. Musa A. G. Albarr,

formerly known as Richard Thompson, was discovered shot to death on March 7, 1977. Found hidden at the decedant's premises were two photographs in which the Appellant appeared. It can be noted here, that it doesn't take too much imagination to realize, that these photographs made various people susceptible to blackmail and that extortion could be a motive for or related to a violent homicide. Of course, this is in marked contrast to York, where the photographs served no legitimate purpose.

At this point, a slight digression is in order. Looking to 56 ALR 3d 397-398, we see the general rule that:

> "A person who intentionally places himself in the public eye or otherwise acquires notoriety or becomes a public character or personage relinquishes a part of his right to privacy. In other words to whatever degree and in whatever connection a man's life has ceased to

> be private before the publication under consideration has been made, to the extent the protection of the right of privacy is withdrawn."

Of course, the Appellant herein was in public employment and held a responsible position insofar as he was Personnel Director of The City of Akron; but this is of marginal significance at best in light of the circumstances of the case. What is important, however, is that the Appellant had already circulated or allowed the circulation of these photographs to some degree, before they ever came to the official police attention in the course of the homicide investigation.

Appellees police officers state here, that by engaging in the instant legal analysis they in no way mean to imply that they have in any manner wrongfully circulated these photographs, that they circulated these photographs, or that they

did anything wrongful at all. In fact, extra precautions were taken to insure the privacy of the Appellant, as much as this can be done in the course of a homicide investigation.

It is obvious that there are several other crucial differences between the instant case and York. The young woman, York, was a victim; Appellant is a suspect in a homicide. Other people involved with Appellant in regards to the photographs are suspects in a homicide. York was forced by the police to pose for the photographs. Appellant took the photographs himself or cooperated in the taking of the photographs for his own personal reasons. The police lied to York about destroying the photographs; there is nothing equivalent here. York was forced to disrobe and pose in front of a male officer, although a policewoman was present

in the station; there is nothing equivalent here.

In reality, the only similarities between this case and York is they both involve photographs that the Plaintiff/Appellant allege were improperly handled. None of the other indispensable factors from York are present here. Since York stands as the solitary example of a Civil Rights Act-based invasion of privacy suit, from 1963, it would appear that all, or substantially all, or at least substantially similar factors to York would have to exist in order to achieve a second occurrence of that rare commodity. That is simply not the situation here.

In summary, even giving the Appellant every benefit of the doubt, neither portion of the two-part test set down in Travers v. Paton, 261 F. Supp. 110, 115, Note 15, (1966), is met. There was no

restraint of Appellant's liberty as when the young girl was forced to disrobe and pose; and there was no grossly obscene conduct approaching that of York.

Regarding Petitioner's second claim, in the case at hand, Appellant's Complaint centered on the fact that he was deprived of procedural due process in that he was allegedly discharged without a hearing. Appellees argued that there was no discharge that Appellant resigned "effective the pay period ending March 19, (1977)". To this end, the respective counsel agreed to submit the issue surrounding the resignation/discharge to the Court. Upon reviewing the briefs of counsel, the Court held that there remained an issue of fact for the jury to decide. Basically, at issue was the intent of the parties reference Appellant's resignation, i.e., when was it to take effect.

Appellant contends that because he was wrongfully discharged and because he has undisputedly established compensatory damages, even though Appellees denied such damages in their Answer to Appellant's Complaint, that the Trial Court must set aside the jury verdict of nominal damages and enter judgment for the full amount as proven.

> The matter of setting the verdict aside in such cases (inadequate damage award) usually rests primarily in the discretion of the trial court, and its action in granting or refusing to grant a new trial on the ground of inadequacy will not be disturbed on appeal unless an abuse of discretion is shown. 22 Am. Jur. 2d, Section 398, Damages, Pg. 533.

In charging the jury reference Appellant's claim that he was denied procedural due process, the jury was to consider whether it was Appellant's intent to resign effective the pay period ending March 19, 1977, or whether it was for

sometime in the future, thereby giving him the opportunity to withdraw his resignation. If the latter were the case, the jury then was to determine whether Appellant would have been discharged had he received a hearing.

In Carey v. Piphus, 435 U.S. 247, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978), the Supreme Court held that:

> "In the absence of proof of actual injury, public school students who were suspended from school without procedural due process and who bring actions under 42 U.S.C.S., Section 1983, against school officials are entitled to recover only nominal damages; if it is determined that the suspensions were justified, the students nevertheless are entitled to recover nominal damages not to exceed one dollar from the officials."

The jury, however, was instructed further in that they could award compensatory damages for wages or emotional and mental distress plus punitive damages and attorney fees.

Therefore, in his charge to the jury, the Court gave the following charge reference wages:

> "The Plaintiff can be compensated for wages or emotional and mental distress if you find by the preponderance of the evidence that the Plaintiff was deprived of a hearing and further find by the preponderance of the evidence that if a hearing were held the Civil Service Commission would have determined from the facts that the Plaintiff was wrongfully discharged.
>
> "So, if you get to this issue, you must determine if the Plaintiff was wrongfully discharged and if a hearing would have been held he would not have been discharged, in other words, knowing the facts the Commission would not have discharged the Plaintiff in a hearing.
>
> "Stating it another way, before the Plaintiff can recover wages or compensation for any emotional and mental distress for being denied a hearing, you would have to determine that he properly rescinded his resignation and that if granted a hearing thereafter, and based upon all the evidence, the Civil Service Commission would not have relieved him of his duties.

"In this connection, the Defendants were permitted to offer proof, which may be considered by you, that if a hearing were granted the Civil Service Commission would not have discharged the Plaintiff."

The Court continued and addressed the subject of nominal damages and punitive damages in part saying:

"As stated, if you find by a preponderance of the evidence that the Plaintiff is entitled to a verdict in accordance with these instructions, but do not find that the Plaintiff has sustained substantial actual or compensatory damages, you may then return a verdict for the Plaintiff in the sum of $1, that being nominal damages.

"The award of nominal damages on account of actual or compensatory damages would not preclude your awarding punitive damages in such amount as you deem appropriate, if you find that the award of punitive damages is justified."

Furthermore, Courts are reluctant to disturb jury awards, but will do so in particular incidents.

"If the recovery is not a mere matter of computation, it will not be disturbed unless so excessive or inadequate as to indicate prejudice, passion, partiality, or corruption on the part of the jury, or it appears to have been based on an oversight, mistake, or consideration of an improper element; it may be disturbed where it is so excessive (or inadequate) as to shock the court's conscience or sense of justice." 25 Corpus Juris Secundum, Section 196, Damages, Pg. 262.

Further it is stated:

"Ordinarily it is the duty of the Court to instruct the jury as to the proper basis on which damages are to be estimated, so that the matter may not be left to their uncontrolled discretion, as by furnishing them with proper criterion, guide, rule, method, or standard by which to assess the damages." 25 Corpus Juris Secundum, Section 178, Damages, Pgs. 191-192.

The jury, therefore, was given a complete and comprehensive charge as to the award of damages. There is no showing or evidence supporting corruption, partiality, passion, or prejudice on the part of the jury toward the Appellant.

The Court, moreover, did not err concerning Appellant's motion for additional damages.

CONCLUSION

Respondents, therefore, contend that no conflict in decisions of this Court exists with the holdings in this case and, therefore, Petitioner's Petition for a Writ of Certiorari should not be granted.

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CERTIFICATION

A copy of the foregoing Brief was sent this 2nd day of March, 1979, by regular mail, to John R. Vintilla, Attorney for Petitioner, 550 Hanna Building, Cleveland, Ohio 44115.

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